

October 26, 2011

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL A. FELS,

Defendant - Appellant,

and

ZACHARY C. WILLIAMS; SHARON L.
DREW; HEALTH SOLUTIONS
NETWORK, LLC,

Defendants.

No. 11-6253
(D.C. No. 5:10-CR-00216-HE-4)

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SHARON L. DREW,

Defendant - Appellant.,

and

ZACHARY C. WILLIAMS; MICHAEL
A. FELS; HEALTH SOLUTIONS
NETWORK, LLC,

Defendants.

No. 11-6254
(D.C. No. 5:10-CR-00216-HE-5)

ORDER

Before **BRISCOE**, Chief Judge, and **MURPHY** and **O'BRIEN**, Circuit Judges.

This matter is before the court to consider the government's motion to dismiss these interlocutory appeals for lack of jurisdiction. Upon consideration thereof, the motion is **GRANTED**.

The district court described the pending criminal charges against Michael Fels and Sharon Drew as follows:

Defendants Michael A. Fels and Sharon L. Drew are charged in a six count superseding indictment with violations of the Controlled Substances Act ("CSA"), 21 U.S.C. §§ 801-904, and the Federal Food, Drug and Cosmetic Act ("FDCA"), 21 U.S.C. §§ 301-397. . . .

The superseding indictment alleges that defendants Williams, Fels and Drew operated White Eagle RX ("White Eagle"), a pharmacy without a valid license, filling prescriptions for internet websites such as Health Solutions Network, LLC ("HSN").¹ Count 1 charges all four defendants with conspiring to deliver, distribute and dispense fioricet, a controlled substance, by means of the internet in violation of 21 U.S.C. § 841(h)(1)(A). Count 2 charges all defendants with conspiring to hold misbranded drugs for sale and to introduce misbranded drugs, specifically fioricet, a controlled prescription drug, and soma and tramadol, prescription drugs, into interstate commerce in violation of 12 U.S.C. §§ 331(a), (k) and 333(a)(2). Counts 3-6 charge all defendants with distributing Fioricet, a Schedule III controlled substance.

Docketing Statement at 238-239, *United States v. Fels*, No. 11-6253.

The defendants appeal an order of the district court denying their motion to dismiss their criminal charges based on an assertion of tribal immunity. They argue for immunity in two ways. First, they claim that, as agents of the tribe, they are generally immune from federal criminal laws when acting on the tribe's behalf. Second, they claim tribal immunity because the pharmacy they operated was licensed by the Ponca Nation and is therefore a duly licensed pharmacy.

As a general rule, we lack jurisdiction to hear immediate appeals of the denial of a motion to dismiss an indictment. *United States v. Ritter*, 587 F.2d 41, 43 (10th Cir. 1978). However, some interlocutory appeals are subject to immediate review under the collateral order doctrine. For an order to fall within the collateral order doctrine, the order must (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action," and (3) "be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

Defendants argue this court has jurisdiction to hear an interlocutory appeal of the denial of sovereign immunity under the collateral order doctrine. *See Osage Tribal Council v. U.S. Dep't of Labor*, 187 F.3d 1174, 1179 (10th Cir. 1999) (denial of tribal immunity is an immediately appealable collateral order). The government argues that the sovereign immunity argument is not colorable and therefore not immediately appealable. *See Woodruff v. Covington*, 389 F.3d 1117, 1125 (10th Cir. 2004) (refusing jurisdiction

over “[a]n interlocutory appeal that does not even assert a colorable right”) (quotation marks and citations omitted). The government contends the immunity claim is frivolous because it is not applicable where a criminal law of general applicability is being enforced.

With respect to the first asserted basis for immunity, the defendants have not demonstrated a colorable claim that their cases fall outside the general rule that they are subject to general federal criminal statutes. *See United States v. Barquin*, 799 F.2d 619, 621 (10th Cir. 1986) (collecting “cases which hold that tribal members are subject to general federal criminal statutes unless a particular Indian right or policy is infringed by enforcement of the law”). *See also United States v. Begay*, 42 F.3d 486, 499 (9th Cir. 1994) (a federal criminal statute of nationwide applicability applies equally to everyone within the United States, including Indians); *United States v. Newell*, No. 09-1950, 2011 WL 2675362, at *8 (1st Cir. 2011) (“Although tribes generally retain the right to self-government, they are nonetheless subject to federal criminal jurisdiction of both a specified and more general nature.”) (citation and quotation omitted). Because defendants’ first claim is not colorable on present showing, we lack interlocutory jurisdiction to consider it.

We also lack jurisdiction to hear on interlocutory appeal the defendants’ second claim, that the government’s allegation concerning the licensure of the pharmacy implicates tribal immunity. As we discussed in *Osage Tribal Council*, orders attacking a tribe’s immunity from suit are immediately appealable because a tribe loses the benefits

of immunity from suit if it is forced to go to trial. 187 F.3d at 1179. As we understand defendants' second claim of immunity, they are not actually asserting sovereign immunity, but rather a defense to the charges filed. By arguing that the pharmacy was duly licensed, they do not seek immunity, but rather seek to refute an element of the criminal charges levied against them. Because this defense may be asserted at trial, and because it is not "effectively unreviewable on appeal from a final judgment," *Coopers & Lybrand*, 437 U.S. at 468, we lack jurisdiction to address it under the collateral order doctrine.

APPEALS DISMISSED ON PRESENT SHOWING.

Entered for the Court,

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", followed by a horizontal flourish line.

ELISABETH A. SHUMAKER
Clerk of Court